



October 9, 2001

Ms. R. Yvette Clark  
General Counsel  
Stephen F. Austin State University  
P.O. Box 13065, SFA Station  
Nacogdoches, Texas 75962-3065

OR2001-4564

Dear Ms. Clark:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 153002.

Stephen F. Austin State University (the "university") received two requests for the names of four finalists responding to the university's request for proposal and copies of the proposals submitted by these finalists. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 2156.123 of the Government Code. You also indicate that because the requests may implicate the proprietary rights of third parties, you have notified the third parties pursuant to section 552.305 of the Government Code. The notified third parties are TKO Advertising, Inc.; Kolar Advertising-Marketing ("Kolar"); Guerra DeBerry Coody; and Hancock Advertising. We have considered the submitted arguments and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 2156.123 of the Government Code provides:

- (a) The commission or other state agency shall avoid disclosing the contents of each proposal on opening the proposal and during negotiations with competing offerors.
- (b) The commission or other state agency shall file each proposal in a register of proposals, which, after a contract is awarded, is open for public inspection unless the register contains information that is excepted from required disclosure under Subchapter C, Chapter 552.

Gov't Code § 2156.123(a),(b). Subchapter C of chapter 2156 of the Government Code prescribes procedures for the use of competitive sealed bid proposals by state agencies. *See* Gov't Code § 2156.121. We note that section 2156.123 does not contain express language that makes information confidential. This office has held that the statutory confidentiality protected by section 552.101 requires express language making certain information confidential or by stating that information shall not be released to the public. Open Records Decision No. 478 (1987) (construing statutory predecessor to section 552.101). Thus, because section 2156.123 does not expressly make information confidential or expressly state that the information shall not be released to the public, the university may not withhold the submitted information under section 552.101 in conjunction with section 2156.123 of the Government Code.

Because you do not raise any other exceptions to disclosure for the submitted information, we next address the arguments of the notified third parties. To date, this office has not received any correspondence regarding this request from TKO Advertising, Inc; Guerra DeBerry Coody; and Hancock Advertising. Because these third parties did not submit arguments in response to the section 552.305 notice, we have no basis to conclude that the information of these third parties is excepted from disclosure. *See* Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Therefore, the university must release the submitted information of TKO Advertising, Inc; Guerra DeBerry Coody; and Hancock Advertising.

We next address Kolar's arguments under sections 552.104 and 552.110. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations, not third parties. *See* Open Records Decision No. 592 (1991). As the university does not raise section 552.104, this section is not applicable to the requested information. *Id.* (section 552.104 may be waived by governmental body). Therefore, the requested information may not be withheld under section 552.104.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. The governmental body, or interested third party, raising the commercial or financial information prong must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

In support of its section 552.110(b) claim Kolar states:

The information supplied to [the university] included information that could be of use to competing agencies in current and future bids for work. Although the requestors are no longer taking part in the current bid for [the university's] business, the potential for us to compete for other business is great. Additionally, if the records are released at this time, the agencies that remain in the bidding process may also receive the documents and potentially underbid and change strategic approaches. The advertising industry is small in Texas and the same agencies often compete against one another for clients. Not only does our proposal contain budgetary/financial proposals (Appendix H), and our proprietary approach to branding, media selection, and measurement tactics (Part D, Appendix I), but also contains our marketing/strategic approach proposal for [the university] (Part E).

After reviewing the information at issue and the arguments set forth by Kolar, we conclude that Kolar has demonstrated that substantial competitive injury would result from disclosure of some of Kolar's information. The university must withhold most of the information in Parts D and E and all of Appendices H and I. We have marked Kolar's information that the university must withhold from the requestors under section 552.110(b) as commercial or financial information.

In summary, the university may not withhold any of the information under section 552.104 of the Government Code or under section 552.101 of the Government Code in conjunction with section 2156.123 of the Government Code. In addition, the university may not withhold any of the information of TKO Advertising, Inc; Guerra DeBerry Coody; and Hancock Advertising. We have marked Kolar's information that the university must withhold from the requestors under section 552.110(b) of the Government Code as commercial or financial information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

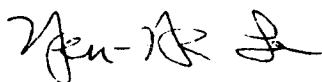
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/DKB/er

Ref: ID# 153002

Enc: Marked documents

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